Department to await the completion of that rulemaking prior to taking any action (Bell Atlantic Supplemental Comments at 3-4). NSTAR agrees that access to a utility's poles, ducts, conduits and rights-of-way is necessary to further competition (NSTAR Supplemental Comments at 4). NSTAR comments that mandatory access to all utility property should not be permitted where access to such property (i.e. service centers and substations) is unnecessary to advance competition (id.). NSTAR states that public utilities should have no greater obligations in providing non-discriminatory access than those properties privately owned (id.).

ALTS/WinStar seeks Department clarification to ensure that access to right-of-way is not simply to right-of-way outside private buildings but extends to right-of-way within privately owned buildings (ALTS/Winstar Initial Comments at 1-2). ALTS/Winstar further urges the Department to establish rules encompassing: 1) the placement of antennae on CB or MDU rooftops, 2) access from the roof to the riser conduits and other pathways linking the antenna on the roof to the "common block" where outside telecommunications facilities are cross-connected to the interior wiring, and 3) direct access to the end user, where good engineering practices so dictate (ALTS/Winstar Initial Comments at 10-11). Teligent asserts that disputes over rights-of-way within CBs and MDUs will adversely affect Massachusetts consumers' ability to choose among competing telecommunication carriers (Teligent Supplemental Comments at 3). To prevent such disputes, Teligent suggests that the

Department interpret the term right-of-way to permit competitive telecommunications carriers nondiscriminatory access to right-of-way over private property (Teligent Supplemental Comments at 5).

2. Analysis and Findings

In order to serve consumers in CBs and MDUs, carriers logically require a route into CBs and MDUs and into their telephone closets and rooftops. Carriers are often restricted in developing their own rights-of-way either because the CB and MDU owners prohibit these carriers access or charge prohibitive fees for such access. Historically, a traditional electric, gas, and telephone company obtained rights-of-way through private property either by negotiation with the landowner or by governmental authority. Rights-of-way have always been a critical factor in conferring important services or consumers and remain today a critical factor in providing competitive services to the public. There must be a way for an intelligible telecommunications signal to travel from a sender and arrive at its intended receiver. Much of modern life would be impossible - - or, at least, gravely impeded - - if consumers in their homes and businesses were blocked from enjoying telecommunications services. The poles, ducts, conduits and rights-of-way are the infrastructure supporting the networks over and across which such communication may occur. Without such support, the entire system would be impossible. It matters little to the consumer whether that infrastructure lies in public ways or in the building which he leases - - so long as he has access to telecommunications providers of his choice through that infrastructure. Section 25A's breadth supports this view.

In order to compete effectively, telecommunications carriers and cable system operators must have the opportunity through nondiscriminatory access to provide service to consumers, including those in CBs or MDUs. Carriers' and operators' inability to offer services within CBs or MDUs denies tenants the right to choose, and thereby denies those consumers the benefits of the very competition that the 1996 Telecommunications Act sought to bestow on them. For competitive carriers to have the fair opportunity to succeed in the market, they must have at least potential access to customers seeking their services. Though competitive suppliers' networks may serve a consumer's street, the consumer derives no benefit from competition if his lessor arbitrarily stands between him and the telecommunications service the consumer might, if unfettered, choose. The legal status of landlord does not compass the role of exclusive broker of a tenant's telecommunications custom.

Black's Law Dictionary defines "right-of-way" as "a right belonging to a party to pass over the land of another." Black's Law Dictionary 921 (6th ed. 1991). The term "right-of-way" is not defined in the Massachusetts Pole Attachment Statute or in the Current Regulations. In judging the statute as a whole, general rules of statutory construction permit the Department to apply the term "right-of-way" broadly to encompass a utility's means "for supporting or enclosing wires or cables" for telecommunications, located inside and on commercial and residential buildings, as well as outside. This construction of the term "right-of-way" is consistent with its ordinary meaning and effectuates the intent of Legislature in promoting consumer sovereignty in his choice of telecommunications provider. Our broad

application of the term is necessary in order to prevent incumbent electric and telecommunications companies from claiming that their existing private right-of-way does not permit sharing access with competing telecommunications carriers and cable system operators. Consistent with the policy expressed by the General Court and Congress, the Final Regulations make clear that utilities who own or control the necessary infrastructure[18] may not unjustifiably discriminate between and among competing providers of telecommunications and cable services on rates, terms and conditions associated with access to this infrastructure.

Bell Atlantic requests that the Department consider Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The Loretto case involved the issue of whether the placement of cable on an apartment building's rooftop or within its walls constituted a taking. The Loretto Court held that when the government causes a permanent physical occupation of property, a taking results. The Loretto Court stated that, "The power to exclude has traditionally been considered one of the most treasured strands in an Owner's bundle of property rights" id. at 435; and so the taking of property always requires compensation. Id. at 441.[19] Much has happened in telecommunications since 1982; and one may agree with the

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[18] The Department's use of the term "infrastructure" is broad in order to promote maximum access to and by the end-user. Thus, in an appropriate case, we may interpret the terms poles, ducts, conduits and rights-of-way to include piers, abutments, manholes, rooftops (for example, the case of microwave or other wireless communications) where local zoning permits telecommunications closets, risers, and other necessary infrastructure.

[19] The underlying principle in Loretto was recognized from the start by the Supreme Judicial Court in perhaps our earliest public utility dispute to leave an appellate record:

(continued...)

Loretto dissenters that the majority analysis "represents an archaic judicial response to a modern social problem." Id. at 452, Blackmun, J., dissenting. Whether Loretto would be decided the same way today may be doubted, but it evidently remains the law.

More recently, the Court in Gulf Power Co. v. United States, 998 F.Supp. 1386, 1390 (N.D. Fla. 1998) decided that while mandated access to electric utility poles and conduits imposed a taking under Loretto, it was not an unconstitutional taking because just compensation was provided. The Court held that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." Id. at 1390, citing Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194, 105 S. Ct. 3108, 3120, 3121 (1985).

While in certain circumstances, access to a particular CB or MDU could possibly constitute a taking, most access into a CB or MDU may not itself be a taking, because it will involve mere access to and sharing of the same right-of-way already dedicated for public use.

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[19](...continued)

> It may be observed that the sacred rights of private property are never to be invaded but for obvious and important purposes of public utility. Such are all things necessary to the upholding of mills. Hence the legislature have authorized mill-owners to invade the property of their neighbors, even real property, which by our laws seems to be regarded as the most inviolable, so as to render it wholly useless, by overflowing it with water, whenever the same shall be *necessary* to the beneficial occupation of the mills. This invasion of private property is authorized only by statute, and in no case but from *necessity* for the attainment of the objects intended.

Spring v. Lowell, 1 Mass. 423, 430 (1805) (emphasis in original), Sedgwick, J., concurring (dispute over damages from sawmill dam flowage on the Saco River in 1794).

In this instance, there would likely be no taking because the property owner has previously given up his or her right to exclusive use of that part of the property for the purpose of providing his lessees with access to electric or telecommunications service. Therefore, the property owner cannot legitimately complain that access by additional carriers creates a taking where access by the first service provider did not.

To the extent that additional carriers need to occupy space not already occupied for public use, some reasonable compensation by users of poles, ducts, conduits or rights-of-way may be required to satisfy Constitutional concerns. It is not the Department's intent (and certainly not the Legislature's) to deny compensation for the use of a utility's right-of-way or a landowner's property. The Massachusetts Pole Attachment Statute provides a "utility," as there defined, an adequate process for obtaining just compensation:

> Said department, pursuant to the provisions of this section, shall determine a just and reasonable rate for the use of poles and communication ducts and conduits of a utility for attachments of a licensee by assuring the utility recovery of not less than the additional costs of making provision for attachments nor more than the proportional capital and operating expenses of the utility attributable to that portion of the pole, duct, or conduit occupied by the attachment.

G.L. c. 166, § 25A. The compensation process mandated by the statute and implemented by the rules adopted here satisfies Gulf Power and hence Loretto.

The Department will ensure that the just and reasonable rates required by G.L. c. 166, § 25A also satisfy the Constitutional "just compensation" mandate. The entire cost of wiring and the installation of any other equipment necessary to provide telecommunications services will be assumed by the attaching telecommunications provider or cable system operator, and the attaching telecommunications provider must indemnify and hold harmless the property

owner for any damages caused by the installation. The telecommunications provider must also offer a bond or otherwise reasonably compensate the property owner for any use of his property associated with the installation of wiring and other means for the provision of telecommunications service. Obviously, there will be cases where space availability, technical or structural limitations, or other considerations, make installation of competitive facilities quite infeasible. The Department encourages property owners and telecommunications providers and cable system operators to negotiate terms for the actual amount of compensation. In instances where the parties fail to agree, a party may, pursuant to these rules, petition the Department to determine a just and reasonable rate.[20]

Although the pending FCC Rulemaking will address, in part, nondiscriminatory access into CBs and MDUs, there is no requirement that the Department await the FCC's order in this matter. The Department is authorized to promulgate rules that provide for nondiscriminatory access so long as the rules comport with statute. A consumer's ability to choose among competitive carriers offers substantial benefit to both the public and industry. The Final Regulations promote that benefit.

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[20] This analysis assumes that a tenant in a CB or MDU has formally requested service from a complaining telecommunications provider, who barred from achieving on-premises access to the requesting tenant. The provider must be able to document a tenant's binding request as a predicate to invoking 220 C.M.R. 45.00 et seq.

C. Exclusive Contracts and Marketing Agreements

1. Comments

Several commenters request that the Department address the issue of exclusive contracts between carriers and MDUs, arguing that these types of agreements unfairly limit necessary access into CBs and MDUs. Allegiance requests that the Department prohibit exclusionary contracts because when access to MDUs is denied, tenants are deprived of benefits derived from competition and choice (Allegiance Initial Comments at 2). ALTS/Winstar maintains that exclusive contracts should be prohibited because these arrangements are discriminatory and prevent subscribers from receiving the most advantageous pricing, technology and service available (ALTS/Winstar Initial Comments at 11). AT&T urges the Department to ban exclusionary agreements because CB and MDU owners often either demand unreasonable payments for access to carriers or refuse entry into their buildings (AT&T Supplemental Comments at 7).

CompTel recommends that the Department disallow the use of exclusive contracts, arguing they are an unnecessary barrier in providing services to customers within CBs and MDUs (CompTel Supplemental Comments, Att. at 18). RCN maintains that exclusive arrangements violate G.L. c. 166A, § 22 ("the Massachusetts Cable Act")[21] and are contrary to the intentions of Congress as expressed in the Telecommunications Act of 1996 (RCN

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[21] G.L. c. 166A, § 22 states, in pertinent part, "No operator shall enter into any agreement with persons owning, leasing, controlling or managing buildings served by a CATV system, or perform any act, that would directly or indirectly diminish or interfere with existing rights of any tenant or other occupant of such a building to the use of master or individual antenna equipment."

Supplemental Comments at 7). ServiSense asserts that all exclusive contacts should be prohibited since these contracts impede competition, reduce consumer choices, and favor incumbent providers (ServiSense Supplemental Comments at 7). Bell Atlantic suggests the Department adopt a rebuttable presumption that exclusive contracts with owners of MDUs are anticompetitive and thus null and void. Under Bell Atlantic's proposal, a telecommunications provider with an exclusive contract could rebut the presumption by: (1) establishing that failure to maintain an exclusive contract for a period of time would deprive tenants of needed telecommunications services; or (2) demonstrating that certain terms were conditions imposed on the company by the CB or MDU owner. In such instance, Bell Atlantic recommends that the Department restrict the duration of such required exclusivity to a reasonable period of time (Bell Atlantic Supplemental Comments at 4).

2. Analysis and Findings

An exclusive contract is an agreement between a CB or MDU owner and a service provider in which the service provider is given exclusive right to the telecommunications custom of the tenants of the CB or MDU. Exclusive contracts prevent service providers from competing to serve CB or MDU tenants for the period the contract is in effect. Many commenters to this rulemaking describe these exclusive contracts as barriers to entry that have a discriminatory effect; and, therefore, the commenters encourage the Department to prohibit them as against telecommunications public policy as embodied in state and Federal law. We note that the Massachusetts Cable Act prohibits exclusive contracts because these types of arrangements "diminish and interfere with the rights of tenants." G.L. c. 166A, § 22.

Similarly, exclusive contracts within the context of the Massachusetts Pole Attachment Statute interfere with the rights of tenants to freely choose between the many available competitive telecommunication services. The choice already has been made for them by the landlord.

Upon initial consideration, it is difficult to reconcile the existence of exclusive contracts with the nondiscriminatory requirements of this statute. Exclusive contracts clearly have the potential to interfere with the rights of CB or MDU tenants to use the services of any provider they choose. In addition, carriers with exclusive contracts have little motivation to provide competitive services because existing tenants of CBs and MDUs lack any real bargaining power. In fact, other states, such as Nebraska and Connecticut, have prohibited exclusive contracts between telecommunications companies and lessors/owners as inherently anti-competitive.[22] Similarly, the FCC requires that customers of telephone services at aggregator locations (e.g., payphones, hospitals, hotels) have free access to the carrier of their choice, rather than be restricted to use only the presubscribed carrier that the location owner has chosen. 47 U.S.C. § 226 (c)(1)(B), (C); see also 47 C.F.R. §§ 64.703(b).

However, if our ultimate goal is to promote the consumer benefits of a competitive telecommunications market, there may be circumstances where exclusive contracts might be appropriate. For example, the FCC recognizes arguments that new entrants may require exclusive contracts for a limited period of time in order to recover their investment; and the FCC further acknowledges that if such contracts are not permitted, incumbents may face no

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22 See Nebraska Public Service Commission Order Establishing Statewide Policy for MDU Access at 6, Application No. C-1878/PI-23 (March 2, 1999); Conn.Gen.Stat. § 16-2471 (1997).

competition at all. FCC Rulemaking at ¶ 61, citing May 13, 1999, House Telecommunications Subcommittee Hearing, Testimony of Jodi Case, Manager of Ancillary Services, AvalonBay Communities, Inc. at 5. In addition, there may be circumstances where CB or MDU tenants at the time of contracting might benefit from and agree to the property owner's ability to enter into an exclusive contract of reasonable and limited duration by negotiating a discount with the carrier or realizing other efficiency-related benefits of exclusive dealing.

In an effort to ensure that the nondiscriminatory objectives of this rulemaking are also pro-competitive, the Department adopts a rebuttable presumption that an exclusive contract between a service provider and a CB or MDU owner is more likely than not anti-competitive and, therefore, not conformable to statute. The presumption applies to contracts entered into, or extended, as of the date the Final Rules are published in the Massachusetts Register and does not affect valid, extant contracts. A service provider or a CB or MDU owner can rebut this presumption by demonstrating that an exclusive contract benefits tenants and is, therefore, in the public interest.[23] In determining whether an exclusive contract is in the public interest, the Department will consider, among other factors, the duration of the contract, the contracting providers' status as a new entrant to the market, the effect of the exclusive contract on the development of competition and new technology, and efficiency benefits. Accordingly, the

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[23] Three years ago, the State of Ohio adopted a similar rebuttable presumption finding that "any arrangements whereby telecommunications carriers are provided the use of private building riser space, conduit, and/or closet space [are] anti-competitive and unlawful." The Public Commission of Ohio, In the Matter of the Commission Establishment of Local Exchange Competition and Other Competitive Issues, Case No. 95-845-TP-COI, Local Service Guidelines, Appendix A at 71-72 (February 20, 1997).

Department will add the following language to § 45.03(1): "Any exclusive contract between a utility and a licencee entered into or extended after the effective date of these regulations concerning access to any pole, duct, conduit, or right-of way, owned or controlled, in whole or in part, by such utility shall be presumptively invalid insofar as its exclusivity provisions are concerned, unless shown to be in the public interest."

A marketing agreement is a contract by which the owner of a CB or MDU receives compensation from a service provider for allowing it to market its services to tenants or receives compensation for each new tenant that becomes a customer of the service provider. Although probably not as offensive to competition as exclusive contracts, marketing agreements also have the potential to encourage discriminatory behavior, because CB or MDU owners have a financial interest in influencing which service provider their tenants choose. While we do not find marketing agreements presumptively invalid, CB or MDU owners and the telecommunications providers who are partners to such agreements must disclose to tenants/customers the existence and terms of such marketing agreements.

IV. ADDITIONAL COMMENTS ON PROPOSED REGULATIONS

A. 220 C.M.R. § 45.00: Title of Regulations

1. Comments

The Department proposed to amend the title of 220 C.M.R. §§ 45.00 et seq. and to change it from "Rates, Terms and Conditions for Cable Television Attachments" to "Pole Attachment Complaint and Enforcement Procedures." Order, Att. Certain commenters suggest different wording to portray the scope of the revised regulations more accurately

(AT&T Initial Comments, Exh. A, BECo Initial Comments at 8, NECTA, Att. A at 1). Combining these suggestions, commenters recommend a title change from "Rates, Terms and Conditions for Cable Television Attachments" to "Pole Attachment, Duct, Conduit and Right-of-way Complaint and Enforcement Procedures." No commenters oppose an amendment in title.

2. Analysis and Findings

While the existing regulations encompass "Rates, Terms and Conditions for Cable Television Attachments," the Final Regulations address the additional issue of nondiscriminatory access. The current title of the regulations does not describe sufficiently the scope of the Final Regulations. It is, therefore, appropriate to amend the title of the Final Regulations. Accordingly, the title of the regulations will be changed from "Rates, Terms and Conditions for Cable Television Attachments" to the more accurately descriptive "Pole Attachment, Duct, Conduit and Right-of-way Complaint and Enforcement Procedures."

B. 220 C.M.R. § 45:01: Purpose and Applicability

1. Comments

The Department proposed to add language clarifying the purpose and applicability of 220 C.M.R. §§ 45.00 et seq. to ensure "telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-ways on rates, terms and conditions that are just and reasonable." Order, Att. Although no commenters oppose this proposed language, some commenters suggest alternative language.

For example, AT&T requests that § 45.01 be modified to clarify its application to "existing attachments and license agreements between utilities and licensees as well as to any future attachments and license agreements" (AT&T Initial Comments, Exh. A).

2. Analysis and Findings

The existing regulations at 220 C.M.R. § 45.01 are limited to rates, terms and conditions for cable television attachments. The Department proposed to amend 220 C.M.R. § 45.01 in order to acknowledge the expansion of the regulations to encompass additional issues of nondiscriminatory access. For this reason, the Department will modify 220 C.M.R. § 45:01 to read: "220 C.M.R. 45.00 provides for complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to poles, ducts, conduits, and rights-of-ways owned or controlled, in whole or in part, by one or more utilities with rates, terms and conditions that are just and reasonable." This section of the Final Regulations will apply to existing and future attachments and existing and future license agreements, because the opportunity for nondiscriminatory access is a prerequisite to the development of competition in the telecommunications industry. Where utility poles, ducts, conduits and rights-of-way are owned jointly by one or more utilities, each utility shall be severally responsible for ensuring non-discriminatory access.

C. 220 C.M.R. § 45.02: Attachment

1. Comments

Although the proposed regulations do not modify the definition of "attachment" at 220 C.M.R. § 45.02, several commenters suggest additional language to clarify the definition. EECo comments that the current definition of "attachment" does not embrace all available telecommunications technologies. EECo suggests broadening the definition from "transmission of intelligence by telegraph, telephone or television, including cable television" to "transmission of intelligence, including by telegraph, telephone, television and cable television" (EECo Initial Comments at 1). BECo recommends that the definition be amended to include fiber optic cable as well as telecommunications duct or conduit (BECo Initial Comments at 9). National Grid USA recommends that the definition be amended to clarify that "attachment" applies to all utility ducts and conduits and not just ducts and conduits owned by telephone or telegraph companies (National Grid USA Initial Comments at 3).

AT&T requests that the Department clarify whether wireless telecommunications carriers are entitled to nondiscriminatory access under the final regulations (AT&T Initial Comments at 2). AT&T recommends that the definitions of "attachment" and "licensee" be amended to include antennas and wireless telephone (AT&T Initial Comments at 4-5). AT&T notes that because wireless providers are telecommunications carriers within the definition of the Federal Pole Attachment Act and since wireless attachments are not materially distinct from wireline devices, the Department should interpret the Massachusetts Pole Attachment Statute to include wireless carriers (id. at 5).

Winstar comments that fixed wireless carriers require access into and throughout CBs and MDUs in order to provide service to individual tenants (Winstar Initial Comments at 3). Winstar urges the Department to adopt regulations that will ensure consumer choice and promote the advancing telecommunications market to all consumers (id. at 5). Teligent notes that many traditional wireline carriers presently maintain antennas and other wireless type devices on buildings' rooftops (Teligent Comments at 7). Therefore, Teligent requests that the Department offer guidance on the scope of access into CBs and MDUs by wireless carriers seeking to service its tenants (id.). Metricom asks that the Department interpret the Massachusetts Pole Attachment Statute broadly to include wireless carriers.[24] Metricom states that while the definitions of "attachment" and "licensee" in the Massachusetts Pole Attachment Statute do not refer expressly to providers of wireless services, the Department has the latitude to determine that the final regulations equally apply to wireless carriers and their attachments (Metricom Initial Comments at 8).

2. Analysis and Findings

In the past, pole attachments[25] consisted of conventional wireline equipment, such as wires and cables that fastened to poles and were pulled through ducts and conduits. Today's telecommunications services use a combination of wires, cables, spectrum, digital pulses of

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[24] On March 28, 2000, Metricom filed a Motion for Leave To File Comments After Expiration of Comment Period along with Metricom's Comments. On April 5, 2000, Metricom served both the Motion and Comments to all commenters in this proceeding. No commenters objected to Metricom's Motion. The Department hereby grants Metricom's Motion and will consider its filed Comments.

[25] As broadly used here. See p. 2, above.

electricity, and other related devices (such as those used to translate broadcast microwave signals into electrical pulses for television or computer CRTs). Who can say what additional, now unforeseen services lie over the horizon?

AT&T, BECo, EECo, Metricom, Teligent and Winstar request that the Final Regulations be modified to address new technological advances since the state and Federal pole attachment statutes were enacted. In today's market, cable and telecommunications companies often apply a number of wireless technological components to their services, such as satellite links and microwave relays. Similarly, some wireless providers employ networks comprised of wires and cables and require wireline facilities.

The FCC's authority to regulate wireless attachments was recently reviewed by a three judge panel of the 11th Circuit Court of Appeals in Gulf Power Company, et al. v. FCC, 208 F.3d 1263 (11th Cir., 2000).[26] The Court concluded that the Federal Pole Attachment Act did not give the FCC the authority to include wireless communications equipment or attachments within the pole attachments regulatory scheme because the Federal statutory definitions of "attachment" and "utility" read, in combination, only give the FCC authority to regulate attachments to poles used, at least in part, for wire communications, and not wireless

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[26] The Court consolidated several petitions seeking review of In re Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 F.C.C.R. 66777 (1998) (codified at 47 C.F.R. §§ 1.1401-1.1418 (1999)) ("Report and Order") implementing the Federal Pole Attachment Act. On May 26, 2000, the FCC appealed the panel's decision to the full Court sitting *en banc*.

communications.[27] Id. at 1273-1274. In addition, the Court reviewed the legislative history of the Federal Pole Attachment Act and found that the 1996 amendment to the Act was made to allow telecommunications service providers to attach to utilities' "bottleneck facilities" without having to pay monopoly rents. Id. at 1275. The Court stated that poles are not bottleneck facilities for *wireless* carriers because most *wireless* equipment can be placed on any tall building or other structure. Id. The Court noted that wireless systems operate in a completely different manner than do wireline systems: wireline networks transmit through linear networks of cables strung between poles, while wireless networks transmit through a series of concentric circle emissions that allow the network to continue working if one antenna malfunctions. Due to these differences, the Court questioned whether there are any bottleneck facilities for wireless systems and found that there is no need to protect wireless operators from any threat of monopoly pricing. Id.

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[27] Pursuant to the Federal definition, the term "pole attachment" means: "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4). The term "utility" means: "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any state." 47 U.S.C. § 224(a)(1).

As with the Federal Pole Attachment Act, the Massachusetts Pole Attachment Statute does not explicitly authorize the Department to regulate purely wireless attachments:

> Attachment means any *wire or cable* for transmission of intelligence by telegraph, telephone or television, including cable television, or for the transmission of electricity for light, heat, or power and any related device, apparatus, appliance or equipment installed upon any pole or in any telegraph or telephone duct or conduit owned or controlled, in whole or in part, by one or more utilities.

G.L. c. 166, § 25A (emphasis added). The Massachusetts Pole Attachment Statute's use of the terms "wire or cable" in its definition of attachment, therefore precludes purely "wireless" carriers from the category of companies able to take advantage of non-discriminatory access to utility's rights-of-way. The question then is who are the precluded "wireless" carriers? We cannot base a distinction here on whether the device contains a wire or cable alone as many of today's services use a *combination* of wireless and wireline technologies. For example, there are some companies categorized as commercial mobile radio service ("CMRS") providers, which are not subject to Department regulation as G.L. c. 159 common carriers. See Investigation by the Department of Public Utilities upon its own motion on Regulation of Commercial Mobile Radio Services, D.P.U. 94-73, at 14 (1994). There are also carriers who provide local exchange and other telecommunications services using a *combination* of wires, antennas, and radio signal, but who are not categorized as CMRS. These latter carriers are regulated by the Department as G.L. c. 159 common carriers.

The fixed facilities used by CMRS providers to render service do not have to be at the location of the end user. For example, cell sites can be located on a tower to serve mobile customers within a certain radius of that cell site. Utility poles, ducts, conduits and rights-of-

way are not bottleneck facilities for these carriers because they do not require such access to reach their end customers. Contrast that to a situation where a carrier uses an antenna or satellite dish on a particular building to serve customers in that building. In this case, the carrier, practically speaking, requires access to utility rights-of-way to reach the end user. Otherwise, the consumer is denied access to a burgeoning array of modern telecommunications services.

Therefore, in circumstances where a "wireless" device located within or on a CB or MDU is necessary to receive and convey telecommunications signals for the benefit of a particular, requesting consumer located within the CB or MDU on which the wireless device is located, our new regulations would apply. Without the wireless attachment on his CB or MDU, a lessee/consumer would not be able to receive that particular service. The consumer's free choice of telecommunications provider would be constrained - - and unreasonably so. A compensatory rate for such an attachment would, of course, be in order. However, if the "wireless" technology is designed merely to relay or rebroadcast signals and is not necessary to serve a particular, requesting consumer in that CB or MDU, these regulations would not apply. Access to facilities to enable a lessee/consumer to receive a signal is distinct from access merely for broadcasting. These transmitting technologies are able through location agreements to attach to countless facilities (e.g., buildings, towers, billboards) and do not require access into CBS or MDUs to serve consumers within those CBS or MDUs.[28] But the

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[28] We note and emphasize that, subject to determinations that might be made under G.L. c. 40A, § 3, nothing in these regulations per se may be construed as authorizing any (continued...)

consumer who wants to take advantage of wireless reception of telecommunications services should be able to enter an agreement with a provider in order to receive those services; and the provider chosen by the consumer should be able to use internal ducts, conduits, risers, etc. within the tenant/consumer's building and make incidental, unobtrusive attachments in order to make the tenant/consumer's choice a reality.[29]

Finally, because the services provided by, and regulatory treatment of, "wireless" carriers furnishing local exchange and other telecommunications services using a combination of wires, antennas, and radio signal are identical to services and regulation of other common carriers, our rules will be neutral as to the technology used to provide services.

Accordingly, we interpret and apply the term "attachment," where appropriate, in order to include a range of both existing and new technologies -- consistent with the goals for meaningful competition and to ensure technologically neutral access. The statute should be construed to effect its intent to benefit the public at large. Because the rapid growth and deployment of the various communications technologies likely would quickly render outdated

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[28](...continued)
practice or attachment not in conformance with local zoning codes.

[29] Wireless telecommunications is one of the fastest growing and most promising technology. The ability to distribute wireless intelligence within a CB or MDU through ducts and conduits is essential to realizing its potential for consumers. Regulation that discriminates against wireless technology in favor of traditional landline technology to some extent turns its back on the future. Pure wireless telecommunications providers evidently do not come within the ambit of the Federal Pole Attachment Act. Gulf Power Co. v. Federal Communications Commission, 208 F.3d 1263 (11th Cir., 2000). The Massachusetts Pole Attachment Statute differs from its Federal counterpart and is broad enough to compass hybrid or mixed wireless-and-wire systems.

any highly specific interpretation of "attachment," we will endeavor to eschew constraining specificity. Instead, when necessary to determine what is an "attachment," we will determine whether the technology at issue falls within this statutory definition. When making such a determination, the Department will look to the language of the statute as well as the purpose which the statute seeks to accomplish -- namely the promotion of consumer sovereignty.

D. 220 C.M.R. § 45.02: Complaint

2. Comments

The Department proposed to expand the definition of "complaint" at 220 C.M.R. § 45.02 to include a filing that alleges a denial of access to a pole, duct, conduit, or right-of-way owned or controlled, in whole or in part, by one or more utilities. Order, Att. NECTA and MMA support the proposed amendment (NECTA Initial Comments, Att. A at 2; MMA Initial Comments at 2). No commenters oppose the amendment.

2. Analysis and Findings

The complaint procedures contained in the Current Regulations address only filings containing allegations that a rate, term, or condition for an attachment is not reasonable. The Department's proposed revision to the definition of "complaint" is necessary to effectuate a procedure for addressing allegations of nondiscriminatory access by telecommunications carriers and cable system operators to utility poles, ducts, conduits, and rights-of-way. Therefore, the Department will adopt the proposed revisions to provide an appropriate complaint procedure for allegations of discriminatory access.

E. 45.03: Duty to Provide Access; Modification; Notice of Removal, Increase or Modification; and Petition for Interim Relief

1. Comments

The Department proposed the adoption of complaint procedures similar to the Federal pole attachment complaint procedures found at 47 C.F.R. § 1.1401. et seq. Order at 2. Many commenters support the adoption of these procedures (AT&T Initial Comments, Exh. A; BECo Initial Comments at 9; MCI WorldCom Initial Comments at 3-4; NECTA Initial Comments, Att. A at 2-4; National Grid USA Initial Comments at 3-4, 6-8; RCN Initial Comments at 14-17).

Bell Atlantic requests clarification of a potential ambiguity in the proposed procedures concerning a utility's requirement to respond to requests for access to poles, ducts, conduits and rights-of-way within 45 days (Bell Atlantic Initial Comments at 2). Bell Atlantic requests that the Department clarify that utilities are required to provide written responses to access requests, but are not required to provide actual physical access, within the 45 day period (Bell Atlantic Initial Comments at 3).

MMA suggests that the 60 day minimum notice requirements contained in proposed 220 C.M.R. § 45.03(3) be amended to provide for emergency notification to licensees of removal or modification requested by a municipality where public safety is threatened (MMA Initial Comments at 2). Similarly, Bell Atlantic maintains that unanticipated problems can surface, which may not be properly characterized as an emergency, but which require a

utility to undertake a modification in a time-sensitive manner that does not permit 60 days notice (Bell Atlantic Initial Comments at 4). Bell Atlantic suggests that notice be provided as early as practicable (Bell Atlantic Initial Comments at 4).

MCI requests the addition of language similar to that contained in 47 U.S.C. § 224(h), to ensure that attaching parties have a reasonable opportunity to add to or modify their existing attachments when notified that other modifications or alterations to poles, ducts, conduits or rights-of-way are to be made (MCI Initial Comments at 4-5). MCI also requests additional language, similar to that contained in 47 U.S.C. § 224(i), to guarantee that costs incurred to rearrange or replace an attachment as a result of new attachments or modifications to existing attachments be paid by the party requesting the new or modified attachment and are not imposed on any entity that has previously obtained an attachment (MCI Initial Comments at 5).

2. Analysis and Findings

The Department seeks to adopt regulations that will ensure timely and nondiscriminatory access to poles, ducts, conduits, and rights-of-way. Requests for access are time-sensitive because of the competitive pressure on carriers to provide services to customers as quickly as possible. However, the Department recognizes that significant coordination among various parties is necessary to provide physical access to poles, ducts, conduits and rights-of-way. The Department must balance the need to ensure a timely response to access requests, with the need to adopt regulations that reflect, to the extent practicable, existing just and reasonable practices between utilities and licensees. Accordingly, we adopt this section of the rules. Pursuant to the Final Regulations, while physical access need not occur within

45 days, utilities must respond to all requests for access within 45 days. Physical access also should be accommodated within 45 days whenever reasonably practicable.

A utility must provide at least 60 days notice to a licensee if that utility's action may affect the licensee's attachments. However, 60 days written notice is not necessary for routine maintenance, or if an emergency situation renders such notification highly impracticable. In the event of an emergency, a utility must endeavor to provide as much notice as is practicable, given the particular circumstances. The term "emergency" will be broadly construed to include bona fide problems that merit exception to the 60 day notice requirement.

As provided in the Final Regulations, carriers should also be given the option to modify their attachments at their own expense in cases in which the owner of a pole, duct, conduit, or right-of-way chooses to alter the existing structures. In addition, should a new attachment require a rearrangement or replacement of existing attachments, the entity seeking to add the new attachment is responsible for the costs associated with the rearrangement or replacement of the attachment.

F. 45.10: Rates Charged Any Affiliate, Subsidiary, or Associate Company

1. Comments

The Department proposed an addition to 220 C.M.R. §§ 45.00 to ensure that utilities charge any affiliate, subsidiary, or associate company engaged in the provision of telecommunications or cable services an amount equal to the pole attachment rate for which another unaffiliated company would be liable. Order, Att. National Grid USA suggests the Department substitute the term "equal" for "equivalent" in referring to the rate to be charged to